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# In the Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER, PETITIONER

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the Environmental Protection Agency's Phase II Stormwater Rule, 64 Fed. Reg. 68,722 (1999), violates the Tenth Amendment by coercing local governmental entities to either enforce a federal program or surrender their police powers.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-92) is reported at 344 F.3d 832.

### JURISDICTION

The initial decision of the court of appeals was entered on January 14, 2003. The court denied all petitions for rehearing, but vacated its opinion, and entered its final decision and judgment, on September 15, 2003. The petition for a writ of certiorari was filed on December 15, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The Environmental Protection Agency (EPA) issued its Phase II Stormwater Rule, 64 Fed. Reg. 68,722 (1999), pursuant to the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, to control pollutants discharged to waters of the United States by municipal separate storm sewer systems serving fewer than 100,000 people (small MS4s). Petitioner and other parties challenged various aspects of the rule. The court of appeals rejected most of those challenges, Pet. App. 1-92, including petitioner's contention that the rule violates the Tenth Amendment, *id.* at 14-22.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," except in compliance with the Act. 33 U.S.C. 1311(a). Section 402 authorizes EPA (or a State with a program approved by EPA) to issue permits for the discharge of pollutants under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. Congress amended the CWA in 1987 to better regulate stormwater discharges from point sources. See Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 69. It added new Section 402(p), 33 U.S.C. 1342(p), which establishes two separate phases for the regulation of MS4 stormwater discharges.[1]

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[1] MS4s are subject to CWA regulation if they collect stormwater runoff and convey it to waters of the United States. The MS4 may contain pollutants picked up by runoff before it enters the MS4 (*e.g.*, fertilizers from lawns, oil from roads) or pollutants introduced directly into the MS4 (*e.g.*, wastes dumped into storm sewers). The MS4 outfall (*i.e.* the pipe(s) or other conveyance(s) through which stormwaters exit the MS 4 and enter the waters of the United States) constitutes the "point source" from which there is a "discharge of pollutants" to "navigable waters." See § 502(6), (12) and (14), 33 U.S.C. 1362(6), (12) and (14).

First, subsections (p)(2) through (4) require EPA to establish a permit program for certain dischargers, including large and medium MS4s (*i.e.*, those serving populations greater than 100,000), according to a prescribed schedule. Section 402(p)(3)(B)(iii) provides that "[p]ermits for discharges from municipal storm sewers * * * shall require controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. 1342(p)(3)(B)(iii). Pursuant to those provisions, EPA issued the Phase I stormwater rule in 1990. Second, subsections (p)(5) and (6) require EPA to investigate other stormwater discharges and to create a "comprehensive program to regulate" them. See 33 U.S.C. 1342(p)(5) and (6). The Phase II stormwater rule addresses those sources, including small MS4s.

2. The Phase II rule requires small MS4s to implement a stormwater management program to reduce discharges of pollutants from the MS4 to the "maximum extent practicable" (MEP). To implement that requirement, the rule gives small MS4 operators three options for NPDES permitting. 40 C.F.R. 122.33(a). An operator may either submit a notice of intent (NOI) to comply with a general permit, apply for an individual permit, or apply to be regulated under a revised or re-issued individual permit covering a nearby large or medium MS4. 40 C.F.R. 122.33(b).[2]

a. Small MS4s seeking authorization under a general NPDES permit must submit an NOI, which describes "best management practices" (BMPs) through which the MS4 or others will implement six minimum control measures (the Minimum Measures). 40 C.F.R. 122.33(b)(1), 122.34(d)(1). The Minimum Measures set out a discharge management program consisting of: (1) public education; (2) public

[2] MS4s can also avoid regulation under the CWA if, for example, they have the ability to direct stormwater discharges to detention ponds that do not discharge to waters of the United States.

participation in program development and implementation; (3) detection and elimination of "illicit," or non-stormwater discharges to the MS4; (4) reduction of pollutants in stormwater runoff to the MS4 from construction activities disturbing one acre or more; (5) control of stormwater runoff from new development and redevelopment projects disturbing one acre or more; and (6) pollution prevention and good housekeeping for municipal operations. 40 C.F.R. 122.34(b)(1)-(6).

b. Alternatively, small MS4 operators may choose to apply for individual NPDES permits (alternative permits). 40 C.F.R. 122.33(b)(2)(ii), 122.34(a). The alternative permit option allows a small MS4 to dispense with some or all of the Minimum Measures and, instead, obtain a custom-designed individual permit based on an abbreviated form of the Phase I MS4 permit application requirements of 40 C.F.R. 122.26(d). In applying for an individual permit, a small MS4 must describe its current stormwater management program, as well as certain components of the program proposed as a basis for permit authorization, but need not provide information concerning its authority to regulate discharges to the MS4. 40 C.F.R. 122.33(b)(2)(ii) (cross referencing permit application regulations for large and medium MS4s at 40 C.F.R. 122.26(d)(1) and (2)). Neither the Phase II alternative permit provisions nor the Phase I permit application provisions they incorporate specify what the permit ultimately issued must contain, except that an alternative permit must require a stormwater management program "designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. 122.34(a).

c. Under the third alternative, small MS4s can apply to be regulated under a revised or re-issued individual NPDES permit covering a nearby large or medium MS4, with provisions adapted and applicable to the small MS4. 40 C.F.R. 122.33(b)(2)(ii). That option, too, affords small MS4s an opportunity to avoid implementing the Minimum Measures that would otherwise apply under a general NPDES permit.

In providing those three alternatives, EPA recognized that it would generally be less expensive for MS4s to implement management practices to limit the introduction of pollutants into their stormwater collection systems than to remove pollutants from their discharges. In implementing management practices, the Phase II rule gives MS4s a choice between utilizing specified minimum control measures or designing another approach to reduce discharges of pollutants to the maximum extent practicable.

3. Various entities brought judicial challenges to the Phase II rule. The court of appeals rejected virtually all of those challenges, remanding the rule on four matters not at issue here. See Pet. App. 4-5. The court specifically rejected petitioner's contention that the Phase II rule violates the Tenth Amendment. Pet. App. 14-22.

The court of appeals recognized that, "[u]nder the Tenth Amendment, 'the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs.'" Pet. App. 19 (quoting *Printz* v. *United States*, 521 U.S. 898, 925 (1997)). Consequently, the federal government may not coerce States or municipalities to regulate third parties to implement a federal program. *Ibid.* (citing *Reno* v. *Condon*, 528 U.S. 141, 151 (2000), and *Printz*, 521 U.S. at 931 n.15)). However, the federal government may encourage States and municipalities to choose to utilize their legislative

authorities to implement a federal program. *Ibid.* (citing *New York* v. *United States*, 505 U.S. 144, 166-168 (1992)).

Applying those principles to this case, the court of appeals ruled that the Phase II rule gives each MS4 a choice: either seek a general permit that requires the MS4 to adopt the Minimum Measures, or seek an individual permit, the terms of which are not prescribed by the rule, but which offers MS4s flexibility in proposing the controls to reduce pollutants to the maximum extent practicable. Pet. App. 20.[3] For example, an individual permit might simply require an MS4 to satisfy specific effluent limitations rather than implement management programs or regulate third parties. *Id.* at 20-21 (citing *City of Abilene* v. *EPA*, 325 F.3d 657, 661-663 (5th Cir. 2003)). The availability of the individual permit option avoids any unconstitutional coercion of MS4s, even if the Minimum Measures option requires MS4s to regulate third parties. *Id.* at 21-22.

The court also ruled that, because the Phase II rule does not coerce States to exercise their legislative powers, the rule does not alter the federal-state framework. Consequently, Congress was not required to provide a clear statement of its intent to authorize EPA to offer MS4s the choice of implementing Minimum Measures. Pet. App. 16 n.18.

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[3] The court remanded portions of the general permitting program of the Phase II rule to the extent that the rule allows regulated entities to establish their own plans to reduce discharges to the maximum extent practicable without requiring that those plans be the subject of review by a permitting authority, or public notice and comment. Pet. App. 29-41. EPA presently is addressing the remand. EPA's actions on remand will not affect the constitutional issues presented in the petition.

## ARGUMENT

The court of appeals correctly rejected petitioner's Tenth Amendment challenge to EPA's Phase II Stormwater Rule. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner's Tenth Amendment challenge to EPA's Phase II rule rests on petitioner's construction of the regulatory provisions establishing the alternative permit program. Pet. App. 20. Specifically, petitioner contends that 40 C.F.R. 122.26(d) requires small MS4s to regulate third parties in order to obtain an individual permit. Pet. 14, 27-29. Petitioner's construction is incorrect and has been rejected by the two courts of appeals that have addressed the issue. *Id.* at 14-22; *City of Abilene* v. *EPA*, 325 F.3d 657 (5th Cir. 2003).

Petitioner's interpretation is flawed because it is inconsistent with the regulation's unambiguous language. EPA promulgated Section 122.26(d) as part of the Phase I stormwater rule applicable to medium and large MS4s. The Phase II rule provides that any small MS4 operator also may apply for an individual permit by submitting a permit application that complies with Section 122.26(d). 40 C.F.R. 122.33(b)(2)(ii), 122.34(a). Nothing in those regulations requires that a MS4 operator undertake to regulate the activities of third parties in order to obtain an individual permit. Indeed, the regulations expressly allow MS4 operators, when applying for individual permits, to decide not to control third-party discharges into MS4s.[4] Conse-

[4] "You do not need to submit the information required by §§ 122.26(d)(1)(ii) and (2) regarding your legal authority [to control discharges to the MS4], unless you intend for the permit writer to take such information into account when developing your other permit conditions." 40 C.F.R. 122.33(b)(2)(ii).

quently, and notwithstanding petitioner's unsubstantiated allegation to the contrary (Pet. 27-28), a permit application that does not contain information regarding controls on third parties would not be denied on the grounds that a MS4 operator has elected not to use its authority to regulate third persons.

2. The Phase II rule does not violate the Tenth Amendment because it allows MS4s to achieve applicable pollution limits by choosing an alternative–individual permits–that does not subject the local government to any conceivably unconstitutional burden. As the court of appeals correctly recognized, EPA's provision of that alternative ensures that the other alternative–general permits with Minimum Measures–does not contravene the Tenth Amendment.[5]

Petitioner does not dispute that the CWA authorizes EPA to limit an MS4's discharges of pollutants. Pet. 2. Those discharge limitations are restrictions of general applicability and are thus constitutional under *Reno* v. *Condon*, 528 U.S. at 150. As discussed above, the individual permit option is a constitutional means of regulating such discharges.

The Phase II rule is not rendered unconstitutional by offering MS4 operators the additional option of complying with a general permit that includes the Minimum Measures. By offering that choice, the Phase II rule observes the principle that "[t]he Federal Government may not compel the States to enact or administer federal regulatory

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"Your storm water management program must include the minimum control measures * * * *unless* you apply for a permit under § 122.26(d)." 40 C.F.R. 122.34(a) (emphasis added).

[5] Because the individual permit option does not compel MS4 operators to exercise their police powers, there is no reason to resolve the further question whether the Minimum Measures actually do compel such exercise.

programs," *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 925-926, but the federal government may offer the States the option of voluntarily participating in implementing those programs, *id.* at 936 (O'Connor, J., concurring). See *New York*, 505 U.S. at 167 ("we have recognized Congress' power to offer States the choice of regulating"); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("We fail to see why the * * * Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

As the court of appeals recognized, the federal government may create inducements for States to participate in the implementation of federal programs, so long as the inducements are not coercive. See Pet. App. 19. This Court has "identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests." *New York*, 505 U.S. at 166. Federal encouragement is permissible if "the residents of the State retain the ultimate decision as to whether or not the State will comply." *Id.* at 168.

Under the Phase II rule, each MS4 operator retains the ultimate decision as to whether it will exercise its legislative authority to control pollutants entering the MS4 or take other measures to reduce discharges of pollutants by the MS4 to waters of the United States. For example, MS4s that conclude that it is contrary to local interests to implement the challenged Minimum Measures may decline to do so and elect to apply for an individual permit. That power to choose ensures that MS4 operators are not commandeered or coerced into enacting and enforcing a federal regulatory program.

Petitioner contends that MS4 operators cannot make an informed choice because, according to petitioner, EPA has not fully informed MS4s of the terms of the individual

permit option. Pet. 24-26. Petitioner has not previously made that argument, and the argument should therefore be treated as waived. In any event, the predicate for the argument is mistaken.

MS4s have various means of acquiring the information necessary to make an informed decision about which stormwater permitting option best suits them. Permitting authority staff members are typically available to discuss the range of options available under both individual and general permits. In addition, EPA regulations provide that an MS4 be given information necessary to determine whether the proposed terms of an individual permit would be acceptably tailored to that MS4's circumstances.[6] For example, after receipt of an individual permit application, the permitting authority issues a draft permit. 40 C.F.R. 124.6. The MS4 can comment on the terms of the proposed permit and otherwise continue to pursue an individual permit. At any juncture in that process, the MS4, knowing the likely terms of an individual permit, can decide that pursuing an individual permit is not the most advantageous option, and can elect to pursue coverage under a general permit.

As the Fifth Circuit's decision in *City of Abilene*, *supra*, illustrates, the NPDES permitting process provides MS4s with sufficient information to make an informed choice. In that case, two cities participated in the application process under 40 C.F.R. 122.26(d)—the process applicable to the

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[6] Each Phase II permitting authority "must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124, and 125" of Title 40. 40 C.F.R. 123.35(a). The Phase II Rule simply supplements those requirements. 40 C.F.R. 123.35(a); 64 Fed. Reg. at 68,744.

alternative permit program. 325 F.3d at 660.[7] Under the negotiated permitting process, EPA offered the cities two options: they could obtain permits with conditions that required the cities to develop, implement, and enforce programs to prevent the discharge of pollutants into their MS4s from a variety of sources, or they could pursue numeric end-of-pipe permits that would have required the cities to satisfy specific effluent limitations rather than implement management programs. *Ibid.* The court rejected the cities' Tenth Amendment challenge, ruling that the cities were not compelled to implement a federal regulatory scheme because they voluntarily chose the management permits over the permits imposing end-of-pipe effluent limitations. *Id.* at 663.

3. Petitioner mistakenly argues (Pet. 16) that, under the Tenth Amendment, only Congress, and not an executive branch agency, may offer States a choice of regulating third parties or being regulated themselves. The Tenth Amendment preserves certain powers of the States against federal encroachment; it does not distinguish between intrusion by the legislative branch as opposed to the executive branch. Cf. *Printz*, 521 U.S. at 935 ("The *Federal Government* may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce federal regulatory programs.") (emphasis added). Because the Phase II Stormwater Rule provides MS4s with choices that eliminate any prospect of a Tenth Amendment violation, petitioner's argument, at most, raises only the question of whether the CWA authorizes EPA to offer MS4 operators the opportunity to

[7] The process was applicable in that case because the cities operated medium MS4s, for which EPA and authorized States issue only individual NPDES permits.

protect water quality by regulating discharges of pollutants into their MS4s.

Petitioner incorrectly contends (Pet. 16-20) that the Phase II rule is invalid because there is no "clear indication" of congressional intent to allow EPA to offer the choices set out in the rule. Congress delegated EPA broad authority to offer that choice. See, *e.g.*, 33 U.S.C. 1342(p)(6) (directing EPA to develop a regulatory program that meets specified minimum requirements and "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate"). EPA responded by allowing MS4 operators to decide for themselves whether to exercise their legislative and executive powers to implement "controls" to reduce the pollutants entering the stormwater. The plain statement rule has no application here, because that approach does not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

Contrary to petitioner's contentions (Pet. 16-17), the court of appeals did not err in deferring to EPA's interpretation of the CWA under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 16 n.18. This Court has indicated that *Chevron* deference is not appropriate where "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). But that is not the case here. The Phase II rule does not commandeer the sovereign powers of MS4 operators, but instead allows them to reduce pollutants in their stormwater discharges either by electing to control pollutants coming into MS4s or by

removing pollutants before discharging to waters of the United States.

Petitioner suggests, for the first time, that the Phase II rule is inconsistent with 33 U.S.C. 1251(b).[8] Pet. 19-20. Even if that argument had been timely raised, it would be wrong. Congress granted EPA broad authority to "prescribe such regulations as are necessary to carry out [the Administrator's] functions under this chapter," 33 U.S.C. 1361(a), and it specifically directed EPA to "establish a comprehensive program to regulate" the kinds of stormwater discharges at issue here. 33 U.S.C. 1342(p)(6). The only relevant constraints are that the regulations, "at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines." 33 U.S.C. 1342(p)(6). EPA's decision to give MS4 operators the option of exercising their regulatory authorities to reduce stormwater-based pollution does not run afoul of Section 1251(b). Rather, EPA's provision of that option distinguishes MS4s from other entities subject to regulation and actually preserves the "primary responsibilities and rights" of political subdivisions of the States "to prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b).

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[8] Section 1251(b) provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. 1251(b).

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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